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No. 01-521

In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,

v.

VERNA KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Brief for Petitioners Republican Party of Minnesota, et al.

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James Bopp, Jr., Thomas J. Marzen, and Richard E. Coleson are Counsel for, and file this brief on behalf of, the following Petitioners: Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African-American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, and Michael Maxim.

QUESTION PRESENTED

Whether the provision of the Minnesota Code of Judicial Conduct that prohibits a candidate for elective judicial office from "announc[ing] his or her views on disputed legal or political issues" unconstitutionally impinges on the freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceedings below:

Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African-American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, Michael Maxim, Gregory F. Wersal, Campaign for Justice, and Kevin J. Kolosky; *Petitioners*;

Verna Kelly was, in her official capacity, Chairperson of the Minnesota Board of Judicial Standards, and has been succeeded by Suzanne White, present Chairperson of the Minnesota Board of Judicial Standards; Edward J. Cleary, in his official capacity as Director of the Minnesota Office of Lawyers Professional Responsibility; Charles E. Lundberg, in his official capacity as Chair of the Minnesota Lawyers Professional Responsibility Board; *Respondents*.[1]

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement remains unchanged. *See Petition for a Writ of Certiorari* at ii.

[1]Respondents are referred to herein collectively as "the State" or "Minnesota."

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The appellate decision denying petitions for rehearing and rehearing en banc, Appendix to *Petition for a Writ of Certiorari* ("P. App.") 130a, is not yet reported. The appellate opinion, P. App. 1a-93a, is reported at 247 F.3d 854. The district court opinion, P. App. 94a-129a, is reported at 63 F. Supp. 2d 967.

JURISDICTION

Appellate judgment was entered April 30, 2001. P. App. 7a. Rehearing and rehearing en banc petitions were denied June 26. P. App. 130a. Jurisdiction exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & REGULATORY PROVISIONS

The First and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983 are printed in the *Petition for a Writ of Certiorari* at 1-2. Minnesota Code of Judicial Conduct Canon 5 is printed at P. App. 130a-135a.

STATEMENT OF THE CASE

Petitioners adopt the Statement of the Case ("Statement") in the Brief of Co-Petitioners Gregory F. Wersal, et al., ("Wersal Br.").

SUMMARY OF THE ARGUMENT

The people of Minnesota have chosen popular elections to select their state judiciary, and the First Amendment has its fullest and most urgent application to the speech of judicial candidates during elections. They have also sought to assure the independence of their judiciary through various constitutional provisions that protect the courts generally, and judges especially, from outside influences that would compromise the actuality or appearance of judicial impartiality.

There is no doubt that the State has a compelling interest in assuring judicial impartiality, and judicial impartiality in deciding particular cases is fully protected by measures, such as recusal, which are not at issue here. In addition, it is legitimate for the State to regulate judicial campaign conduct and speech in various ways to ensure that they are conducted in a way that will not undermine the public perception of judicial impartiality.

However, the announce clause at issue in this case goes too far by prohibiting a judicial candidate from "announc[ing] his or her views on disputed legal or political issues." Minn. Canon 5A(3)(d)(i). Except in exceptional circumstances, judges can be trusted to comply with their oath and decide particular cases in accordance with the law and the facts. Thus, a judge's impartiality is not reasonably questioned merely because she has previously expressed her views on the law. The announce clause, however, without justification, implies the opposite conclusion.

Since judges have a different role than legislators, a judicial candidate may be prohibited from making pledges or promises of certain results in particular cases once in office. However, because state court judges are empowered to make law through the common law and the legitimate exercise of their discretion, the people of Minnesota are entitled to know the judicial candidates' general views on the law in order to make an informed choice. The announce clause deprives the voter of such information and is thus overbroad.

Furthermore, judicial candidates have a legitimate interest in commenting on their general views of the law during campaigns. Judges' views on the law have often already been

publicly expressed through legal writings, public speeches, public service or judicial opinions. These views are subject to attack by third parties and news reporters, but the announce clause prohibits a response by the candidate or his close supporters, potentially undermining public trust and confidence in the judiciary.

Because the free speech rights of judicial candidates, their supporters, and the voters are violated here, the announce clause is subject to strict scrutiny under the First Amendment. However, the announce clause does not pass this exacting scrutiny since it is not necessary to advance any compelling state interest and since it is not the least restrictive means to do so. The announce clause is not necessary to advance the State's interest in the public perception of judicial impartiality because the relation of the announce clause to the interest is too attenuated. Less restrictive means include prohibiting pledges and promises, that more directly address any concerns here. The state has failed to meet its burden by showing that the public expression of a candidate's general views on legal and political issues will have a substantial likelihood of materially prejudicing the public's perception of judicial impartiality.

Finally, people can be trusted. The public values judicial impartiality, and the announce clause undermines the ability of voters to recognize and weed out judges that are not impartial. But, ultimately, whether one prefers election or appointment of judges, the people of Minnesota have retained for themselves the power to select judges through elections, and the announce clause subverts this decision. Thus, the court below erred in holding that the First and Fourteenth Amendments were not violated by the announce clause.

ARGUMENT

I. The Announce Clause Violates the Free Speech Rights of Judicial Candidates, Their Supporters, and the Voters.

The announce clause[2] violates the rights of judicial candidates, their supporters, and the voters through content-based restrictions on freedom of speech, as explained in Wersal's Brief, incorporated herein by reference. Wersal Br. at III. The Eighth Circuit agreed. P. App. 15a-20a. It agreed that the clause is subject to strict scrutiny, requiring narrow tailoring to serve a compelling interest. P. App. 20a. It also found that "a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order," P. App. 21a, with which Petitioners agree. However, it erroneously held that the announce clause was "necessary to serve the compelling interest" here, P. App. 52a, and that it was "narrowly tailored to further compelling [state] interests." P. App. 56a.[3]

II. Prohibiting Public Expression of General Views on the Law by Judges Does Not Advance the State's Compelling Interest in Judicial Impartiality.

The announce clause is not necessary to serve any compelling state interest.

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[2]The "announce clause" provides that "A candidate for judicial office . . . shall not . . . announce his or her views on disputed legal or political issues." Minnesota Code of Judicial Conduct, Canon 5A(3)(d)(i). P. App. 133a-34a.

[3]Petitioners herein adopt the Wersal Brief.

A. Judicial Impartiality, Rather than Judicial Independence, Is at Issue in this Case.

There is a "longstanding Anglo-American tradition of an independent Judiciary," *United States v. Will*, 449 U.S. 200, 217 (1980).[4] Minnesota "has historically pursued the ideal of an independent judiciary." P. App. 22a. It is a judge's solemn duty to "preserve the integrity and independence of the judiciary" because "[a]n independent and honorable judiciary is indispensable to justice in our society." 52 Minn. Stat. Ann., Code of Jud. Conduct, Canon ("Minn. Canon") 1; *see also* 1972 ABA Canon 1 (cited in *Thode* at 7).

Minnesota enacted constitutional provisions with "the explicit . . . goal . . . to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences." *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992). These constitutional or structural foundations support the two key components of judicial independence: the institutional independence of the courts and individual independence of judges. Report of the ABA Commission on Separation of Powers and Judicial Independence, *An Independent Judiciary* (visited Dec. 27, 2001) ("*ABA Report*") <http://www.abanet.org/govaf-

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[4]The need for an independent judiciary is a matter of international concern, *see, e.g.*, David K. Malcolm, *Law Reform in Australia and the Asia Pacific Regions*, Globalization and Law Reform: Cooperation Through Technology (visited Dec. 29, 2001) <http://www.wa.gov.au/lrc/lawreform>, and international thinking about an independent judiciary has influenced our own. *See* E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 45 (1973) ("*Thode*") (citing the Conclusions of the 1959 International Congress of Jurists at New Delhi for the rationale of Canon 1 of the 1972 American Bar Association ("ABA") Code of Judicial Conduct ("1972 ABA Canon")).

fairs/judiciary/rover.html>. Institutional independence "involves matters affecting the operation of the judiciary as a separate branch of government," *id.*, freeing the judiciary from "legislative or executive control." Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson*, 12 St. John's J. Legal Comment. 69, 70 (1996) ("*Remarks*"). Individual independence "is both substantive, in that it allows judges to perform the judicial function subject to no authority but the law, and personal, in the sense that it guarantees judges job tenure, adequate compensation and security," *ABA Report*, ensuring that "individual judges decide cases fairly, impartially and according to the facts and the law, not according to whim, prejudice, or the dictates of the legislature or executive, or the latest opinion poll." *Remarks* at 70.

Minnesota has taken steps to assure both institutional[5] and individual independence.[6] Minnesota has thus pursued "the search for an independent judiciary," P. App. 23a, through structural constitutional provisions while insisting, in its Constitution, that judged be subject to periodic elections. The Minnesota Constitution wants impartial judges, not judges

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[5]To protect institutional independence, it makes the judiciary a separate branch of government, Minn. Const. art. 6 (1857), exclusively vested with the judicial power. Minn. Const. art. 6, § 1 (1982).

[6]To protect individual independence, Minnesota requires that judges be "learned in the law," Minn. Const. art. 6, § 5 (1857), with compensation that "shall not be diminished during their term of office," Minn. Const. art 6, § 5 (1982), and with a guaranteed six-year term. Minn. Const. art 6, § 8 (1956). Judges may not hold any other state or federal office, except in the military reserve. Minn. Const. art 6, § 6 (1982). Only judges who are disabled, incompetent, or guilty of conduct prejudicial to the administration of justice may be removed or disciplined. Minn. Const. art. 6, § 9 (1857).

completely independent from the political process. Petitioners do not challenge these structural provisions; in fact, their existence demonstrates that there are ways to protect judicial impartiality without imposing on First Amendment rights.

Judicial independence is "a means toward a strong judicial institution," Stephen G. Breyer, *Comment: Liberty, Prosperity, and A Strong Judicial Institution*, 61 Law & Contemp. Probs. 4 (1998) ("*Breyer*"), which serves as "a guarantee of judicial impartiality." *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50, 58 (1982) (plurality opinion) (Brennan, J.). "Judicial impartiality is linked to, though slightly different from, the concept of judicial independence." 597 Parl. Deb., H.L. (5th ser.) 1453, 1454 (Mar. 1, 1999) (speech by Lord Chancellor (Lord Irvine of Lairg)) ("*Lord Chancellor Speech*"). Structural provisions for judicial independence provide a framework allowing judges to decide cases independent "from any executive or other interference." *Id.* "The criteria for independence are not absence of influence, but rather the freedom to decide according to one's own conscience and opinions." *Iwa v. Consolidated-Bathurst Packaging Ltd.* [1990] 1 S.C.R. 282.

"Judicial impartiality requires the judges themselves to put their obligations of fidelity to law and compliance with their judicial oath above personal preferences." *Lord Chancellor Speech*. Thus, "impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and parties in a particular case." *Valente v. The Queen* [1985] 2 S.C.R. 673. It suggests a judge "disinterested in terms of the outcome and who is likely to be persuaded by the evidence and the argument submitted." *R. v. S* [1997] 3 S.C..R. 484.

However, this case is not about judicial independence per se because Minnesota's constitutional framework guarantees it, and Petitioners challenge none of it.[7] Nor do Petitioners seek to impose any duty on judicial candidates to take any position in course of a campaign. Petitioners have challenged only the announce clause, which the State defends as necessary to protect "the judges' obligation to render impartial decisions based on the law and facts." P. App. 44a-45a.

This case is about judicial impartiality – about whether the public expression of general views on disputed legal and political issues during a campaign by judicial candidates so undermine the State's interest in judicial impartiality that such speech may be banned. The Eighth Circuit was correct when it identified two separate state interests – independence and impartiality – but erred when it thought that judicial independence, separate from the State's compelling interest in judicial impartiality, was implicated in this case. P. App. 21a-27a. If any interest justifies the announce clause, it would be the State's compelling interest in judicial impartiality.

B. The State's Compelling Interest in Judicial Impartiality Seeks to Prevent Prejudgment or Bias in Deciding Particular Cases.

The State's compelling interest in judicial impartiality seeks to prevent both prejudgment and bias in deciding particular cases. A judge's duty is to be "faithful to the law" and to "perform judicial duties without bias or prejudice." Minn. Canon 3A(2) & (5); *see also* 1990 ABA Code of Judicial Conduct,

[7]Furthermore, Petitioners have not challenged disclosure provisions regarding campaign financing, which also promote an impartial judiciary. Minn. Stat. §§ 10A.01 subd. 10 and 10A.20.

Canon 3B(2) & (5) ("1990 ABA Canon"), *cited in* Lisa L. Milord, *The Development of the ABA Judicial Code* 74 (1992) ("*Milord*")). Prejudgment of a case is contrary to the judge's obligation to make a decision based on the law and facts of the particular case. *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991) ("If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery."). A judge is not faithful to the law if she decides a case based on bias or prejudice against particular litigants. *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977) ("The state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect.").

The Eighth Circuit correctly found that the interest in judicial impartiality involves apparent and actual partiality. P. App. 26a; *see also Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring) ("One of the very objects of law is the impartiality of its judges in fact and appearance."). As to judicial candidates announcing their general views on disputed legal and political issues during a campaign, the Eighth Circuit found an appearance of partiality – candidates may "imply[] how they would decide cases that might come before them as judge[s]" (P. App. 45a) – and actual partiality – judges may feel somewhat bound by prior statements in deciding cases. P. App. 46a-47a.

But a distinction exists between ensuring judicial impartiality in deciding a particular case and protecting the public perception of judges generally as impartial decisionmakers. The law protects against actual or perceived partiality of judges *in deciding particular cases* through disciplinary, disqualification

and recusal rules, as well as due process protections. If a judge makes a statement in a campaign giving rise to a reasonable perception of partiality in a particular case, numerous remedies exist if the case is assigned to him. Therefore, the announce clause is directed at something other than protecting litigants or the judiciary from actual or perceived partiality when judges are asked to decide particular cases.

The only remaining rationale for the clause would be protecting the public perception of judicial impartiality – a concern that exists in only the most general and amorphous way when considered apart from judicial impartiality in particular cases.

Promoting public confidence in the judiciary – including perceived judicial impartiality – is a compelling interest, but the announce clause is not an effective, much less least-restrictive, way to advance this interest. Public perception of the judiciary is based on numerous factors[8] having nothing to do with judicial candidates' statements in elections. Fortunately, the American people have high regard for the judicial system,[9] and "the more

[8]Public perception of the judiciary is influenced by many factors, with many remedies suggested. *See generally* Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary*, 30 New Eng. L. Rev. 914, 915 (1996) ("*The Confidence Game*"). Two important national surveys conducted in 1999 demonstrate the complexity of public perception. *See* American Bar Association, *Perceptions of the U.S. Justice System* (visited Dec. 26, 2001) <http://www.abanet.org/media/perception/home.html> ("*ABA Survey*"); National Center for State Courts, *How the Public Views the State Courts* (visited Dec. 26, 2001) <http://www.ncsc.dni.us/ptc/eis/national/Publications/Publications.htm> ("*NCSC Survey*").

[9]Eighty percent agreed that "in spite of its problems, the American justice system is still the best the best in the world." *ABA Survey* at 6.

knowledge people have about the justice system the greater their confidence." *ABA Survey* at 7. Judges fair well in surveys.[10] While many respondents believe "politics influences court decisions," the "views held by respondents in states that appoint judges or use merit selection do not differ greatly from those of respondents in states where judges are selected through partisan elections." *NRSC Survey* at 43. This data suggests that voters view judges as part of the political system generally, and thus responsive to some political influence, but that neither appointment nor election poses any significantly greater risk.[11]

However, there are ways of improving public confidence in the judiciary. A National Center for State Courts report identified fifteen confidence issues, with the three key ones as unequal treatment in the justice system, the high cost of accessing the system, and lack of public understanding. A plan was developed around these three issues "for building public trust and confidence" in the judiciary. National Conference on Public Trust and Confidence in the Justice System, *National Action Plan: A Guide for State and National Organizations* 4, 16 (visited Dec. 26, 2001) <http://www.ncsc.dni.us/ptc/eis/national/Publications/Publications.htm> ("*NCSC Report*").

Minnesota attempts to protect public perceptions of its judiciary through numerous restrictions on what judicial

[10]Eighty percent agreed that "[j]udges are generally honest and fair in deciding cases." *NCSC Survey* at 30.

[11]The NCSC Survey reported on a Texas survey that found that "respondents both roundly criticized campaign fund-raising by judges and overwhelmingly chose election as their preferred method of judicial selection." *Id.* at 43.

candidates may say or do during elections. Candidates are prohibited from holding office in a political organization, attending political party gatherings, seeking or using political party endorsements, and soliciting funds for a political organization. Minn. Canon 5A(1)(a), (d), (e). Judges must resign to become candidates for non-judicial offices. Minn. Canon 5A(2). Judges are severely limited in their own fundraising activities. Minn. Canon 5B(2).

Candidate speech is limited in many justified ways, such as through prohibitions against publicly endorsing other candidates or making speeches on behalf of any political party, Minn. Canon 5A(1)(b) and (c), making promises of conduct in office, misrepresenting an opponent's identity, qualifications, present position or other fact, and manifesting bias or prejudice inappropriate to public office. Minn. Canon 5A(3)(d)(i) and (ii).

As to a judge's expression of views on the law, the announce clause is irrational because it only applies to what judicial candidates say during election campaigns. The views of candidates will nevertheless often be known. Incumbent judges express their views on disputed legal and political issues through written opinions. But the judge cannot publish campaign literature telling voters "if you want to know my views, read the following, which comes from my decision in the *John Doe* case." Furthermore, judicial candidates have often spent their professional lives discussing the law and their views on it. News reporters and commentators interpret the views of candidates to the electorate even if candidates cannot.

Thus, the announce clause does not effectively insulate the public image of the judiciary from perceptions influenced by knowledge of the judges' views. In any event, absent a pledge

to decide a particular case a certain way, public airing of general views on the law by judges does not give rise to an unacceptable appearance of partiality. *See infra* at II.C.3

Therefore, the relationship between public confidence in the judiciary and the announce clause is too attenuated to justify such a draconian ban on speech. The announce clause is a broad prophylactic rule and "[p]rophylaxis is the antithesis of narrow tailoring." *Hill v. Colorado*, 530 U.S. 703, 762 (2000) (Scalia, J. dissenting) (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. . . . [since] [p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.")).

Finally, accepting the premise underlying the announce clause – that public expression of the general views of a judge on the law during a campaign creates an unacceptable risk of public perception of partiality – necessarily implies that judges are incapable of complying with their oath to decide cases on the law and facts before them. Our Nation's history demonstrates that, with rare exceptions, American judges are made of hardier stuff.

C. Judges Can Be Trusted to Comply with Their Oath and Decide Cases Impartially.

Judges are bound by oath to decide cases based on the law and facts of a particular case. English, then American, judges have generally taken that oath seriously, and it is presumed they will decide cases before them impartially.[12] This presump

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[12] "[T]he law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly

tion of impartiality means that judges need not recuse themselves on remand, even though they decided the case wrongly:

> Some may argue that a judge will feel the "motivation to vindicate a prior conclusion" when confronted with a question for the second or third time, for instance, upon trial after a remand. Ratner, Disqualification of Judges for Prior Judicial Actions, 3 How. L.J. 228, 229-230 (1957). Still, we accept the notion that the "conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect." *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652 (2d Cir. 1943). The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office.

Liteky, 510 U.S. at 562 (Kennedy, J., concurring); *see also McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998) (recognizing "the presumption that a judge has discharged his or her judicial duties properly"). The announce clause unjustifiably reverses this presumption when judges express general views on the law.[13]

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depends upon that presumption and idea." 3 W. Blackstone, Commentaries *361. "The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926).

[13]An announcement by this Court that judges generally cannot be trusted to follow their oaths of office simply because they have stated a general view on a disputed legal or political issue would itself be a devastating blow to the public's perception of judicial impartiality.

1. Public Expression of the Views of Judges Is a Necessary Judicial Function.

Judicial opinions are a judge's most frequent, comprehensive expression of views on disputed legal and political issues. They require candor, and "[c]andor . . . is necessary to put future litigants and lawyers on notice of the state of the law." *The Confidence Game* at 915. The announce clause does not ban expression of a judge's views through written opinions, even during a campaign, for this would cut to the heart of the judicial function. The obligation to issue legal opinions requires a judge to express views on disputed legal and political issues during the heat of the campaign – to her benefit or detriment.

The Minnesota rules are a patchwork of inconsistent decisions. A judge may freely express her general views on the law[14] in law review articles, law school speeches, and speeches before the bar or other interested organizations. Minn. Canon 4B; 1990 ABA Canon 4B. A judge may advocate changes in the substantive law. Minn. Cannon 4B; 1990 ABA Canon 4B. But Minnesota's announce clause does not allow the judge to make announcements about her earlier efforts to improve the law by recommending changes in the substantive law.[15] The specialized audiences that the judge typically addresses might be less inclined to assume that a judge's expressed views dictate a result in a particular case, but they would also be better able to

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[14]"Law" is defined broadly to include "court rules as well as statutes, constitutional provisions and decisional law. 1990 ABA Canon Terminology.

[15]Commentary to the 1990 ABA Canon 4 explains that judges are in a "unique position to contribute to the improvement of the law," including revision of "substantive and procedural law," and thus judges are "encouraged to do so," through a bar association or independently. *Milord* at 84.

exploit legal implications these views may entail. And prospective candidates[16] who are not yet judges, may state their views before declaring their candidacies.

Reporters and commentators will interpret to the general public the views of judges and judge-candidates expressed to specialized audiences. Interest groups and the press will communicate a message about the candidate's alleged views, however imperfectly or dramatically.

The announce clause, merely prevents judicial candidates from speaking to voters directly, with appropriate clarity and restraint – including when necessary to correct distortions.[17] It does not effectively insulate voters from knowing the views of candidates for judicial office. If the public expression of those views is enough to give rise to a public perception of partiality, then the announce clause does not serve the purpose of suppressing knowledge of candidates' views. Its primary effect is to silence judicial candidates, exposing them to misleading

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[16]A "candidate" is "a person seeking selection for or retention in judicial office by election. A person becomes a candidate . . . as soon as he or she makes a public announcement . . . files as a candidate . . . , or authorizes solicitation or acceptance of contributions or support." 1990 ABA Canon Terminology.

[17]The announce clause's suspicious restraint on judges' speech is ironic, since a judge is a "person specially learned in the law," and "in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice." Minn. Canon 4 Comments. A judge is especially suited to explain how her prior decisions conformed to the law, how the judicial system functions to ensure a just result, and the importance of judicial independence. Yet the announce clause prohibits a judge from speaking about much of this at the very time that her message may most need to be heard.

and unjustified attacks that they may not answer, and, thereby, promoting voter ignorance of judicial candidates' genuine views and undercutting the public perception of judicial impartiality.

2. The Announce Clause Does Not Protect Judicial Impartiality in Particular Cases.

When a judge is deciding a particular case, judicial impartiality is fostered and protected through numerous court procedures, judicial canons, statutes, and the United States Constitution.

First, a substantial part of the judicial process is intended to ensure justice by mitigating the effects of judges' peculiar legal views, biases, and prejudices. Most obvious is the right to appeal and multiple-judge appellate panels. Each ensures that a single judge's peculiar view of the law is not the final word.

Second, in addition to the judge's duty to be "faithful to the law" and to "not be swayed by partisan interests, public clamor or fear of criticism," 1990 ABA Canon 3B(2), many more specific judicial canons serve to protect judicial impartiality. Ex parte communications about cases are almost always prohibited, 1990 ABA Canon 3B(7), discouraging "telephone justice," i.e., "the telephone call from the party boss in the middle of the night . . . telling the judge how to decide the case." *Breyer* at 3. Judges are enjoined from permitting familial, social, political, or other relationships, or membership in organizations, from influencing their conduct in office. 1990 ABA Canons 2B, 2C. Judge's extra-judicial activities are regulated, including financial and business dealing, associations with business entities, and investments and gifts, to prevent reasonable doubts about impartiality. 1990 ABA Canon 4.

Judges are subject to disqualification "if the judge's

impartiality might reasonably be questioned" due to situations involving the judge's family and former professional relationships, financial dealings, ownership of property, and knowledge about the case. ABA Canon 3E(1). A federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), or for proven "bias or prejudice." 28 U.S.C. § 144.[18] Disqualification requires "deep-seated and unequivocal antagonism that would make fair judgment impossible. *Liteky*, 510 U.S. at 555; *see also id.* at 558 (Kennedy, J., concurring) ("[A] judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.").

Finally, the due process clause of the United States Constitution sets the floor. Due process requires trial before an unbiased judge, *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971), but "only in the most extreme of cases" is disqualification required. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821, 825-26 (1986). It must be shown that the judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* at 821-22 (citation and quotation marks omitted).

The particular case is protected, and the announce clause adds nothing here.

3. Expression of General Legal Views Creates No Improper Appearance of Partiality.

[18]In addition, the Code of Conduct for United States Judges, 175 F.R.D. 363 (1998), "provide[s] guidance to judges and nominees for judicial office," but has been used to provide "standards of conduct" in disciplinary actions under 28 U.S.C. §§ 332(d)(1), 372(c). 175 F.R.D. at 364.

The Eighth Circuit was concerned that discussion of disputed legal and political issues judges, even without any pledge or promise to decide a particular case in a certain way, "conveys a judicial candidate's propensity to decide cases in a particular way," P. App. 49a, and thus may be prohibited by the announce clause. Application of disqualification provisions and due process protections to judicial discussion of general views on legal matters is instructive because a particular case is when the search for partiality would be most rigorous to prevent injustice to specific litigants. Thus, if the Eighth Circuit's concern were ever justified, it would be strongest in the treatment of particular cases. However, it is not.

It is uniformly accepted in both federal law, 28 U.S.C. § 455(b)(1), and under the ABA Canons that disqualification is

> only required if there is bias concerning a *party*, as distinguished from bias concerning an *issue* in the case. . . . [Thus] a judge need not disqualify himself if bias arises from his beliefs as to the *law* that applies to a case. A judge may have fixed beliefs about principles of law that would not mandate disqualification. Otherwise, a judge could not write books or articles or speak on legal subjects – all activities expressly permitted under [1990 ABA] Canon 4B. Indeed, after deciding cases and creating precedent for years, it would be incredible if the judge did not form some fixed ideas about the law.[19]

[19]The original draft of the 1972 ABA Canon 3C(1)(a), which required disqualification if a judge "had a fixed belief concerning the merits," was changed to the "personal bias or prejudice" standard for fear the original draft would require a judge "to disqualify himself if he had a fixed belief about the law applicable to a given case." *Thode* at 61. "[T]he [ABA drafting] commit-

Ronald D. Rotunda, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* 820-21 (West Group 2000) (emphasis in original) ("*Legal Ethics*"). *See, e.g.*, regarding the federal disqualification statute, *Laird v. Tatum*, 409 U.S. 824, 835-36 (1972) (Rehnquist, J., on motion to recuse); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996); *United States v. Barry*, 961 F.2d 260 (D.C. Cir. 1992); *United States v. Payne*, 944 F.2d 1458 (9th Cir. 1991); *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987); *Southern Pac. Communications v. AT&T*, 740 F.2d 980 (D.C. Cir. 1984); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982); *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980); regarding state disqualification canons, *Papa v. New Haven Fed'n of Teachers*, 444 A.2d 196 (Conn. 1982); *Department of Rev. v. Golder*, 322 So. 2d 1 (Fla. 1975);[20] regarding due process requirements,[21] *Brown v. Doe*, 2 F.3d 1236 (2d Cir. 1993); *Schurz Communications v. FCC*, 982 F.2d 1057 (7th Cir. 1992); *Leaman v. Ohio Dept. of Mental Retardation & Dev. Disabilities*, 825 F.2d 946 (6th Cir. 1987); *Cipollone v. Liggett Group*, 802

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tee recognized the necessity and the value of judges having fixed beliefs about constitutional principles and many other facets of the law." *Id.*

[20]Minnesota cases are in accord. *Roatch v. Puera*, 534 N.W.2d 560 (Minn. 1995); *Collection of Delinquent Real Property Taxes v. American Fundamentalist Church*, 530 N.W.2d 200 (Minn. 1995); *In re Welfare of D.L.*, 486 N.W.2d 375 (Minn. 1992); *Nachtsheim v. Wartnick*, 411 N.W.2d 882 (Minn. 1987).

[21]This Court has found that prior expressions of views on issues that then came before administrative adjudicators did not require disqualification, *FTC v. Cement Institute*, 333 U.S. 683 (1948); *United States v. Morgan*, 313 U.S. 409 (1941), which apparently put this question to rest.

F.2d 658 (3rd Cir. 1986).[22] Since the general discussion of one's views is not sufficient to disqualify a judge in a particular case, when the interest in an impartial judiciary is at its height, prohibiting such utterances in the general context in which the announce clause operates cannot be justified.

III. The Announce Clause Is Not Narrowly Tailored to Protect the State's Interest in Judicial Impartiality.

The announce clause is not narrowly tailored to promote a compelling interest, because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests," *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), making it overbroad because it is not the "[least] restrictive alternative [to] serve the Government's purpose." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

A. The Announce Clause Prohibits a Broad Category of Speech Relevant to Judicial Office.

1. The Announce Clause Sweeps Too Broadly.

The language of the announce clause is broad: "A candidate for judicial office, including an incumbent judge . . . shall

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[22]*But see Republic of Panama v. American Tobacco Co.*, 217 F.3d 343, 250 F.3d 315, *rehearing en banc denied*, 265 F.3d 299, 300 (5th Cir. 2001) (Wiener, J., dissenting) ("The panel opinion for this case marks the first time in the history of American jurisprudence that an appellate court has reversed a trial judges's discretionary refusal to recuse himself – and has ordered the judge recused – based solely on the fact that many years earlier, while he was a practicing attorney, he had been linked (erroneously at that) with one view of a legal issue that was then pending in state court and . . . [that view] is now being espoused by one of the parties in a case pending before him.").

not . . . announce his or her views on disputed legal or political issues." Minn. Canon 5A(3)(d)(i).[23] Nearly every legal or political issue is disputed, and nearly every issue is potentially legal or political.[24] Furthermore, allowing judicial candidates to speak about their resumes and court administration[25] still does not allow judicial candidates to express their general views on the law, which is what this case is about. The Seventh Circuit in *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993), explained the breadth of the announce clause:

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[23]Minnesota has a separate provision that prohibits inappropriate expressions of bias or prejudice by a judicial candidate, Minn. Canon 5A(3)(d)(ii), which Petitioner did not challenge. Thus, the announce clause deals only with the prejudgment aspect of judicial impartiality, which is how the Eighth Circuit correctly viewed it. P. App. 45a-47a.

[24]An expression on a "disputed" legal or "political" issue is not confined to taking sides, for example, on controversial topics, individual candidates, or political parties. "Political" is defined as: "[p]ertaining or relating to the policy or the administration of government, state or national . . . ." *Black's Law Dictionary* 1158 (6th ed. 1990). "Dispute" is defined as: "[a] conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other . . . ." *Id.* at 472. A judicial candidate might thus violate the announce clause by merely announcing general views on an elective judicial selection system or on whether judicial candidates should be allowed to express their general views on disputed legal and political issues, since both of these are matters of some controversy.

[25]As the Eighth Circuit understands the clause, which Petitioners do not question, it also does not forbid candidates from discussing "information about their character, fitness, integrity, background (with the exception of their political affiliation), education, legal experience, work habits and abilities" or "how they would handle administrative duties if elected." P. App. 54a.

> [It] is not limited to declarations as to how the candidate intends to rule in particular cases or classes of case; he may not "announce his views on disputed legal or political issues," period. . . . He ean say nothing in public about his judicial philosophy; he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. . . . The rule thus reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in an election. Indeed, the only safe response to [the announce clause] is silence.

Id. at 228. Finally, the scope of the prohibition is expanded exponentially by applying it to the candidate's family and friends,[26] an issue that the Eighth Circuit did not even address.

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[26]Under Canon 5A(3)(a) and (c), P. App.133a, candidates "shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate" and "shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing." This effectively forbids friends and family from speaking about the general views of the candidate, choking off information about the candidate from those who know the candidate best. Indeed, Wersal was concerned that third parties, over whom he had little control, would engage in activities that would subject him to ethical complaints. J.A. 113.

The judicial impartiality interest does not justify restricting the speech of others than the judge. According to the Eighth Circuit, "[w]e rely on the State's interest in its judges' integrity and independence, which requires keeping judges from doing (or appearing to do) things that compromise their neutrality, rather than keeping others from talking or writing about them." P. App. 27a. The announce clause, by this additional provision, "keep[s]

In an effort to reduce the breadth of the announce clause and to sustain its constitutionality, P. App. 53a, the Eighth Circuit adopted two glosses on the clause. The effort fails on three grounds: (1) it fails to narrow the breadth of the clause, (2) it renders the clause unconstitutionally vague, and (3) the clause is not readily susceptible to the construction.

First, the district court and the Eighth Circuit construed the announce clause to "apply only to discussion of a candidate's predisposition on issues likely to come before the candidate if elected to office." P. App 52a. But limiting the clause to issues "likely to come before them as judges," P. App. 53a, does not narrow its scope. As the Seventh Circuit explained in rejecting an identical gloss on an identically worded announce clause, "the district judge's interpretation does not in fact circumscribe [the "announce clause"] significantly," because "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *Buckley*, 997 F.2d at 229.

From the perspective of the candidate and voter, "issues likely to come before the court" are precisely the ones they care about and the ones most likely to be discussed and debated by the press and others. Few will care about issues that will never come before Minnesota courts, like admiralty law or preventing ocean beach erosion, or matters irrelevant to the

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others from talking or writing about them." But speech restrictions are inappropriate in view of the independent rights of the candidates' family members. *See Supreme Court of New Jersey v. Gaulkin*, 69 N.J. 185, 351 A.2d 740 (1976) (court would no longer adhere to prohibition on a nonjudicial spouse's engaging in political activity).

judge's job, like golf scores or favorite fishing lures.[27]

The Eighth Circuit also believed that "general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause." P. App. 54a. This construction of appears to be precluded by the Minnesota Supreme Court's interpretation of Minn. Canon 7B, the predecessor to Minn. Canon 5A, which contained the identical announce clause. In *Bundlie v. Christensen*, 276 N.W.2d 69 (Minn. 1979), the court was confronted with an allegation that a candidate for judicial office had violated Minnesota's election law by distributing "false information," Minn. Stat. 210A.04(1), about his opponent's court administration. Finding the statements not "factually inaccurate" and the statute not violated, *Bundlie*, 276 N.W.2d at 71, the court opined that it interprets "false information" in light of Minn. Canon 7B:

> "False information" of necessity has a different meaning where an incumbent judge is prevented by judicial ethics from raising money to respond effectively to half-truths and directly justifying his position on legal issues and prior decisions from the bench than does the same phrase have in campaigns involving contestants not similarly restricted.

Id. at 72. The Minnesota court thus appears to interpret the Canon to prevent an incumbent judge from "directly justifying

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[27]The clause's limitations may cause debased judicial campaigns. *See, e.g.*, Editorial, *Hail to the . . . judge*, Chicago Tribune, 2002 WL 2610400 (Jan. 9, 2002) (complaining that judicial ethics force candidates "to act as though they have no opinions on any of the critical issues they will face on the bench," resulting in ads like one featuring "Chief Illiniwek, the symbol of the University of Illinois, dancing about a basketball court").

his position on legal issues and prior decisions from the bench." This is flatly at odds with the construction of the clause imposed by the Eighth Circuit.

The Eighth Circuit's gloss is also inconsistent with the plain language of the announce clause and would render it incomprehensible and thus vague. As Judge Beam, in his Eighth Circuit dissent, explained:

> I cannot fathom "disputed legal issues" more likely to come before a court than the proper role of stare decisis, narrow or strict construction, original intent and substantive due process. Yet are these not captured by the term "judicial philosophy?" The term is as sweeping as the court's allegedly narrow construction.

P. App. 77a.

The announce clause is not readily susceptible to these constructions.[28] Federal courts may only construe a law or

[28]The State first suggested the "likely to come before the court" gloss in Defendant Flinn's summary judgment brief, which invited the district court to narrowly construe Cannon 5 "if necessary to preserve its constitutionality," citing *Stretton*, 944 F.2d at 143-44. District Court Docket # 84 at 26. Plaintiffs responded that "the 'announce clause' is not amenable to such a construction," citing *Buckley*, 997 F.2d at 226. District Court Docket #106 at 22.

In the Eighth Circuit, Defendant Flinn's Appellee Brief, at 48-49, noted that Plaintiffs did not "even mention[] . . . that the district court interpreted the clause in a narrow fashion," *id.* at 48, then devoted six pages to arguing for the construction, *id.* at 49-54, apparently recognizing that Wersal's argument in his Appellant's Brief constituted an implicit rejection of the District Court's construction. In his Reply Brief at 1-5, Wersal argued extensively that Canon 5 was not readily susceptible to the District Court's construction.

regulation to save it from constitutional attack if (1) it is "readily susceptible" to the saving construction,[29] and (2) state courts have not already authoritatively construed it. *Stenberg v. Carhart*, 530 U.S. 914, 938-46 (2000); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395-97 (1988); *Houston v. Hill*, 482 U.S. 451, 468-69 (1987); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216-17 (1975); *Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965).[30] However, the "announce clause" cannot be

This issue, therefore, has been argued below and, while the Eighth Circuit found that Wersal had not properly raised this issue in his opening brief in that court, it dealt with it on the merits. P. App. 52a-53a. In any event, this Court has exercised its discretion to decide matters not properly raised on appeal in circumstances similar to these, *Capital Cities Cable v. Crisp*, 467 U.S. 691, 697 (1984), and to prevent injustice. *Hormel v. Helvering*, 312 U.S. 552, 556-60 (1964); *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, ___n. 27; 121 S. Ct. 1879, 1891 n.27 (2001).

The Eighth Circuit's additional gloss, that "general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause," has a different history. The State first suggested this gloss in Defendant Flinn's summary judgment brief. District Court Docket # 84 at 25-26. Plaintiffs objected to this construction. District Court Docket #106 at 23. The District Court did not adopt this gloss ,but only the "likely to come before the court" gloss. P. App. 129a. In their Briefs before the Eighth Circuit, the State did not argue for this construction. Thus, this gloss first arose on appeal in the Eighth Circuit's opinion itself sua sponte. P. App. 54a. Thus, this issue can properly be raised here.

[29]Federal courts have broader license to construe federal statutes, *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 41-43 (1976) (per curiam) (construing "any expenditure . . . relative to a clearly identified candidate" to mean "expressly advocating the election or defeat of a clearly identified candidate"), but state statutes must be "readily susceptible" to such a construction.

[30]Thus, both lower courts were in error because they construed the announce clause based on a mere prediction "that the Minnesota Supreme

narrowly construed because (1) "its language is plain and its meaning unambiguous," *Houston*, 482 U.S. at 468, and (2) the Minnesota Supreme Court has already implicitly interpreted it broadly.

The plain, unambiguous language of the clause prohibits a candidate from "announc[ing] his or her views on disputed legal or political issues." Minn. Canon 5A(3)(d)(i); P. App. 133a-34a. Neither its text nor its context provides justification for the lower courts to play pin the tail on the canon, as they did when attaching "likely to come before the candidate if elected into office" to the announce clause. P. App. 52a. Neither lower court attempted to explain how the announce clause language was readily susceptible to appending ten extra words and a concept not previously present, even in latent form.

The announce clause was adopted by the Minnesota Supreme Court in its unconstrued form. Had that court wanted to add the "likely to come" language on it, it had the opportunity in 1995, when such a change was proposed. In June 1994, the court's own Minnesota Advisory Committee urged the Minnesota Supreme Court to adopt the ABA's 1990 "commitments clause,"[31] P. App. 50a, due to constitutional concerns with the overbreadth of the "announce clause," which was patterned after the ABA's earlier 1972 model. P. App. 8a, 49a-

Court would interpret the announce clause narrowly, consistent with the construction urged upon the Court by the Judicial Board." P. App. 128a, 52a-53a.

[31]Under this clause, a candidate may not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." 1990 ABA Canon 5A(3)(d)(ii) (cited in *Milord* at 99).

50a. The Minnesota Supreme Court refused, P. App.51a, thereby explicitly rejecting the gloss the lower courts attached to the clause in this case.

The Minnesota announce clause, derived from the 1972 ABA Canons, is not the same thing as the 1990 ABA Canon's "commitments clause." The Seventh Circuit held that it is not the "proper business [of the federal courts] to patch up the rule," "transform[ing] the rule into the [1990] ABA Canon." *Buckley*, 997 F2d at 230.[32]

In itself, the announce clause bans speech on a nearly endless set of matters that are the subjects of political and legal controversy in contemporary society. Beyond mere identifying information, assurances that the candidate will perform in office competently, and some administrative recommendations, it is difficult for the candidate to know with any assurance what he or she might safely discuss with the electorate. Thus, what political or legal speech the clause does not freeze, it chills, and the only response is silence.

2. The General Views of Judicial Candidates Are Relevant to the Office Sought.

Judicial candidates have views on disputed legal and political issues that affect their decisionmaking. "Since most Justices [of this Court] come to this bench no earlier that their middle years, it would be unusual if they had not by that time

[32]The Third Circuit in *Stretton*, 944 F.2d 137, construed the announce clause in a manner consistent with the "commitments clause." *Id.* at 144. This case is distinguishable from *Stretton*, however, because the Minnesota Supreme Court here has already had the opportunity to adopt the "likely to come before the court" language and declined. No such state court construction of the announce clause at issue in *Stretton* was available to that court.

formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another." *Laird*, 409 U.S. at 835 (Rehnquist, J.). Lower court judges also have views, *see, generally, In re J. P. Linahan*, 138 F.2d 650 (2d Cir. 1943), that affect their decisionmaking. *See, e.g.,Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (Reinhardt, C.J.,concurring); *see, generally*, J. David Rowe, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech*, 73 Tex. L. Rev. 597 (1995) ("*Rowe*").

Because judges are empowered to make law, voters have a legitimate interest in knowing the general views of candidates on the law. Leaving aside the debate over instances where it is claimed that judges make law without legal warrant, there are two areas where judges are not "neutral umpires," but have a positive role on the development of the law. First, judges exercise discretion. As one court explained:

> As to relevance, the court is acutely aware that judges routinely exercise their discretion within the confines of the facts and the law. How judges choose to exercise their discretion is a matter of much concern to litigants, lawyers, and the public alike. That concern makes a judicial candidates' views on disputed legal and political issues anything but irrelevant.

American Civil Liberties Union of Florida v. The Florida Bar, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990) ("*ACLU*").

Second, and most importantly for state court judges, the constitutions of the several states empower the state courts to develop and enforce the common law, subject to acts of the legislature. Minnesota state courts have been active in developing common law. *See* Wersal Br. at I.B.3. Thus,

> judges make law on a daily basis. . . . [B]ecause judges make law – or, more precisely, because judge-made law varies, depending upon who is sitting on the bench – the constituents who elect their judges have a right to know the positions of the candidate before they are asked to go to the polls.

Rowe at 613.

As explained below, while it would be improper for candidates to pledge or promise how they would exercise their discretion in a particular case or how they would resolve a particular case, given that the State has chosen to pick judges by popular election rather than by appointment, the voters have a legitimate interest in knowing the values, legal philosophy, and general views of the candidates on the law.

3. Judicial Candidates Have an Interest in Expressing General Views on the Law.

Because judges are silenced during their campaigns by the announce clause, they are forbidden to state their positions in response to matters that arise during their campaigns or by virtue of their previously announced views. This victimizes judicial candidates. Incumbent judges are especially vulnerable. They *must* announce their views on disputed legal and political issues through their opinions and decisions, but the canons "prevent the candidates from being able to respond to attacks on their legal and political beliefs." Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. Rev. 207, 238 (1987) ("*Snyder*").

Candidates who are not presently judges are also disadvantaged unless they cynically "game the system" by expressing views on hot-button political and legal issues and attacking judicial opinions of their future incumbent judge opponents before becoming candidates. Upon becoming candidates, the announce clause protects them from having to explain their carefully designed pre-candidacy record and attacks.

Thus, a practical imbalance is created between the incumbent judge candidate and the challenger. In fulfilling judicial obligations, judges write or join opinions resolving disputed legal and political issues, thereby exposing them to attack, to which they cannot respond. Nor may judges decide cases selectively, with an eye to the upcoming election, but the challenger can design his campaign – selecting issues to comment upon – while the judge must do her duty and hope that her deeds speak louder than the words others say about her. The announce clause would then often work to undercut the public perception of judicial impartiality when questions are raised but must go unanswered.

The announce clause also discourages those who have held office or engaged in public debate on legal or political matters from seeking judicial office. Such candidates have public records that are open to attack or distortion, yet the announce clause prevents them from effectively defending themselves. The announce clause favors candidates with concealed views and legal technicians without a record of stated views. The announce clause thus degrades public perception of judicial impartiality and dilutes the quality of potential candidates.

Ultimately, however, all judicial candidates are subject to

attack, whether meritorious or scurrilous. The press or an interest group might accuse a judicial candidate of membership or sympathy with a controversial group, such as accusing him of being "a card-carrying member" of the ACLU or the Federalist Society. Yet the candidate risks violating the announce clause by denying membership or allegiance to a group's positions, and more so for explaining why the group's goals are salutary.[33]

A candidate might be accused of favoring abortion rights or the right to bear arms, while privately holding opposite views. Yet he would violate the announce clause by publicly stating his true positions on these disputed legal and political issues. Or a candidate might be accused of sexual misconduct or a drunk driving accident in a lawsuit or administrative complaint. Yet, because disputed legal issues are involved, the candidate would be forbidden to explain or defend her conduct or position on such matters.

In sum, the announce clause creates a panoply of inequities and imbalances in an elective judicial system. It prohibits candidates from speaking and the electorate from learning candidates' views from them, yet permits their views to be represented by others. Particularly when those views are under attack, the public's perception of judicial impartiality will suffer if all there is from the judge is silence.

B. The Announce Clause Prohibits More Speech Than Necessary to Advance Impartiality.

The Eighth Circuit opened its analysis of the announce

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[33]If Wersal had been afforded the chance to engage in more open speech, he would have explained past political affiliations. J.A. 125.

clause by correctly observing that:

> [I]t is consistent with the essential nature of campaigns for legislative and executive offices for candidates to detail and make promises about the programs that they intend to enact into law and to administer. For judicial officers, however, a State may determine that this mode of campaigning, insofar as it relates to how judges will decide cases, is fundamentally at odds with the judges' obligations to render impartial decisions based on the law and facts. At the time of the campaign, the candidate simply cannot predict what the facts or arguments in a particular case may be, the precise way in which legal issues will present themselves, or other crucial factors that need be considered before a court issues a final decision.

P. App. 45a. The Eight Circuit supported this conclusion by citing cases that also correctly condemned "particularized pledges and predetermined commitment," *Berger v. Supreme Court*, 861 F.2d 719, 1988 WL 114792 **3 (6th Cir. 1988), and "prejudging issues." *Stretton*, 944 F.2d 137, 142. *See also Buckley*, 997 F.2d, 224, 227 ("Judges should decide cases in accordance with law rather than with any . . . commitments . . . made to . . . campaign supporters or others.").

But from that promising beginning, the court left the realm of pledges and promises and attempted to justify the announce clause. While agreeing that "pledges by candidates to make specific decisions on the bench" "addresses the type of campaign conduct that most blatantly subverts judicial office," the court wanted to reach farther, to prohibit "the specter that candidates are declaring," P. App. 46a, or "implying how they would decide cases that might come before them as judges." P.

App. 45a. This "specter"or "implication" arose simply by announcing one's view on a disputed legal or political issue. The Eighth Circuit has introduced more vagueness by relying on "implications."

As demonstrated, *supra* at II.C.3, a judge stating her position on a disputed legal or political issue has not been found by the courts to suggest improper partiality or prejudgment for purposes of disqualification, discretionary recusal, or denial of due process. When a judge makes a statement in a campaign, a decision in a particular case is not at stake and the statement can be dealt with if such a case arises. If the statement raises a reasonable question about the judge's impartiality, he will be disqualified. So something different is a stake, namely, the public perception of impartiality of the judiciary in general – a weighty interest, but one that prohibiting campaign "pledges and promises" adequately serves.

This is the problem that courts identify: "promises to rule in particular ways in particular cases or types of cases." *Buckley*, 997 F. 2d at 228-30; *Stretton*, 944 F.2d at 142; *Berger*, 1988 WL 114792 at **3; *Morial*, 565 F.2d at 305; *Beshear v. Butt*, 863 F. Supp. 913, 917 (E.D. Ark. 1994); *ACLU*, 744 F. Supp. at 1097 (N.D. Fla. 1990); *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956-57 (Ky. 1991). General statements about the law are qualitatively different than "pledges and promises." The latter commits the candidate to rule a certain way in a particular case; the former does not.

The difference between pledges and promises and general statements on the law is illustrated by *In re Kaiser*, 759 P.2d 392 (Wash. 1988). During Judge James Kaiser's reelection

campaign, he stated (1) that he is "Toughest On Drunk Driving" and "TOUGH ON DRUNK DRIVING" and (2) that he is a "*tough, no-nonsense judge*." (Emphasis in original.) The Washington Supreme Court held that the first statements "single out a special class of defendants and suggest that these DWI defendants' cases will be held to a higher standard when tried before Judge Kaiser... [T]hese statements promise exactly the opposite of 'impartial performance of the duties of the office.'" *Id.* at 396.

"In contrast, Judge Kaiser's statements that he is a '*tough, no-nonsense judge*' are pledges and promises of the permissible kind. They suggest nothing more than a strict application of the law and do not single out any particular party for special treatment." *Id.* Judge Kaiser had not prejudged any particular case and, thus, the second statement was simply a statement of his general judicial philosophy. However, this is a statement about a disputed legal and political issue because others argue that judges must be compassionate and fair, should understand the plight of those charged with crime, and should look for the root social causes of crime.

Furthermore, the Eighth Circuit said that judicial candidates are different. P. App. 17a-18a. Petitioners agree. Candidates for legislative and executive office can make pledges and promises of specific conduct while in office. *Brown v. Hartlage*, 456 U.S. 45 (1982). But because judges are different, because they have a duty to decide a case on the basis of the law and facts before them, they can be prohibited, as candidates, from making such promises.[34] *Buckley*, 997 F.2d at 230; *Morial*, 565

[34]Nominees to the bench, like candidates, should confine themselves to "the most general observation[s] about the law," and not "announc[e] in advance, without benefit of judicial oath, briefs, or argument, how [they] would decide a particular question that might come before [them] as . . . judges." *Laird*, 409 U.S. at 836 n.5.

F.2d at 305. However, the announce canon goes way beyond "pledges and promises" and is thus overbroad.

C. There Are More Narrowly Tailored Means to Protect Judicial Impartiality.

As Judge Beam commented in dissent, "Canon 5 runs rampant through acres of protected speech, and in doing so eschews many less restrictive options." P. App. 91a. Petitioner suggests four.

1. A Pledges and Promises Clause Is More Narrowly Tailored.

A pledge or promise clause that prohibits a candidate for judicial office from pledging or promising "to rule in particular ways in particular cases or types of cases, *Buckley*, 997 F. 2d at 230, in conjunction with the other limits on a judicial candidate's actions and speech during an election, *supra* at III.A.1, would be more narrowly tailored. It would directly deal with prejudgment, which is the only purpose of the announce clause, and restrict the kinds of statements most likely to undermine the public's perception of judicial impartiality. Furthermore, this will provide the "bright line" that is necessary to cure both vagueness and overbreadth. *See Buckley*, 424 U.S. at 39-45.

Without an announce clause, however, nothing mandates that judicial candidates express views on any matter, including disputed legal or political matters. Prudence may advise against announcing views on certain political or legal issues, if a judicial candidate believes that she might compromise her impartiality

as a result.

2. Recusal More Narrowly Protects Against Inappropriate Campaign Statements.

As argued, *supra* at II.C.3, disqualification protects the State's compelling interest in the actuality and appearance of judicial partiality in a particular case. This is a less restrictive means to accomplish this purpose. *Deters v. Judicial Retirement and Removal Comm'n*, 873 S.W.2d 200, 205 (Ky. 1994) (Wintersheimer, J., concurring in part and dissenting in part) ("Recusal is a full guarantee for any appearance of impropriety. The requirement of the appearance of impartiality can easily be satisfied by recusal, voluntary or involuntary, of the judge thought to be offending."). As previously explained, the general expressions of a judge's views on law is not sufficient to require recusal. The Minnesota Supreme Court has the power to change this, but it has not done so.

3. Life Tenure Would Protect Judges Against the Concern about Voter Retaliation.

As the Eighth Circuit observed, the prospect of consequent "supporter abandonment at the next election can weigh heavily on judges who know they were elected based on representations they made during the last campaign." P. App. 47a (citing *The Federalist No. 78* at 471 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (arguing against periodic popular election of judges because it gives them "too great a disposition to consult popularity" when rendering decisions)).[35] Life tenure

[35]A sophisticated judge knows that, ultimately, attempts to shape judicial decisions to fit public opinion are bound to fail. "Every decision is a potential land mine and can provide ammunition for an opponent. But it is difficult to tell in advance which decisions will blow up." Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. Rev. at 985 (2001).

is a less restrictive means to protect judges from concerns about voter retaliation, a measure that Minnesota has specifically rejected because the people want periodic elections.

4. An Appointment or Merit Selection System Is a More Narrowly Tailored Remedy.

Of course, the least restrictive means to resolve concerns about campaign speech is to eliminate campaigns for judicial office by the adoption of executive appointment or merit selection.[36] Minnesota, with consent of the people, could do this, but, as we know, the people have declined.

IV. There Is Insufficient Empirical Evidence to Justify the Announce Clause.

The State faces a quadruple burden to justify content-based restrictions (1) on the speech of candidates for public office and (2) on the speech of their family and supporters, (3) which deprive voters of necessary information during an election, and (4) which can only be justified by presuming that judges are likely to violate their oath of office.

There is no speech more valuable or protected by the First Amendment than speech by candidates and those associated with them campaigning for elective office. W ersal Br. at VII. Elections would be rendered a sham, and sovereignty of the people in choosing their public officials would be subverted, if the government can deprive the people of the information they

[36]*See, e.g.*, ABA Standing Committee on Judicial Independence, *Standards on State Judicial Selection: Report of the Commission on State Judicial Selection Standards* (July 2000) (supporting a merit-based appointive system) (available online at <http://www.abanet.org/judind/jud_selection.html>).

need to make their choice in an election. The argument that judges have become so solicitous of the general public that they can be expected to violate their oath of office because they merely expressed a view on a legal issue suggests not only that judges are a corrupt breed, but that the electorate prefers the corrupt over the honorable.[37]

Only satisfying the heaviest burden of proof can justify muzzling the right of political candidates to give, and the right of the electorate to receive, necessary information during the course of an election campaign. Where speech is directly restrained, the "exacting scrutiny required by the First Amendment" is imposed. *Buckley*, 424 U.S. at 16. This is especially so here because the "constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

This exacting scrutiny is even more necessary here. *Buckley* involved expenditure and contribution limitations

[37]As demonstrated, *infra* at V.B., the voter does not prefer the corrupt, but values impartiality in judges. Because the public values impartiality, judges showing partiality risk defeat at the polls, and "the voting public may reject a judicial candidate who makes excessive or inappropriate campaign pledges." *Snyder* at 248. This serves as a natural restraint on judicial candidate speech, which has served us throughout our Nation's history. - When it was suggested that Salmon P. Chase – President Abraham Lincoln's nominee to this Court to replace Chief Justice Roger B. Taney – should be questioned on how he would vote on slavery and legal tender laws, President Lincoln responded: "We cannot ask a man what he will do [on the Court], and if we should, and he should answer us, we should despise him for it." Nat Hentoff, *To Get A Supreme Court Seat*, Washington Post, August 14, 1999, at A17.

during a campaign. This Court rejected the notion that the expenditure of money in campaigns introduced a non-speech element, which "reduce[d] the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16: *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). This view, however, is not without controversy on this Court. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

However, no expenditure is involved here. The announce clause prohibits pure speech, such as when a judicial candidate is asked to respond to a question or when she speaks to a bar gathering. *See, e.g.*, J.A. 111, 119, 123, 254-55, 280.To prohibit such speech, the question is whether "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the government] has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Even "advocacy of use or force or law violation" can only be proscribed "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

For instance, this Court found that a Nevada Rule of Professional Conduct, which prohibited a lawyer from making "an extrajudicial [public] statement . . . if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding," was a "restraint on speech . . . narrowly tailored to achieve [several] objectives," including protecting "the right to fair trial by impartial jurors." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033, 1076 (1991).This standard "accord[s] speech by attorneys

on public issues and matters of legal representation the strongest protection our Constitution has to offer." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 634 (1995).

The announce clause, however, goes well beyond any speech where there is a particularized finding that the speech creates "a substantial likelihood of materially prejudicing an adjudicative proceeding" by undermining the "impartiality" of the judge. Thus, to justify the announce clause at all, the State is required to show that all such speech poses such a "substantial likelihood." As shown below, they have failed to do so.

Finally, while the presumption of impartiality may be overcome in particular cases through judicial disqualification, as explained *supra* at II.C.2, wholesale and categorical rejection of the presumption for all judges who state their views carries "a much more difficult burden of persuasion." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The court must be convinced that "under a realistic appraisal of psychological tendencies and human weakness," public expression of a judge's general views on the law during a campaign "poses such a risk of actual bias or prejudgment that the practice must be forbidden." *Id.*

The State has failed to meet any of these this burdens: It has not proved that there is any concrete evidence showing the harmfulness of candidates publicly announcing their general views during campaigns. The Eighth Circuit cited only two evidentiary supports for the announce clause. First, the history of the ABA Canons, P. App. 49a, and second, an inference drawn from two Minnesota Supreme Court decisions. P. App. 51a.

First, the history of ABA Canons is at best inconclusive on the need for the sweeping prohibitions of the announce clause.

It demonstrates no more than a general concern that some forms of judicial candidate speech can pose an unacceptable risk of undermining public perception of the impartiality of the judiciary, with which Petitioner agrees, and a historical struggle to formulate appropriate language to identify and define such speech. P. App. 49a-50a. The 1972 announce clause itself is of recent origin, which was soon replaced by newer and more precise language. P. App. 50a.

Second, the Eighth Circuit cites two Minnesota Supreme Court cases, *Moon v. Halverson*, 288 N. W. 579 (Minn. 1939); *Pererson v. Stafford*, 490 N.W.2d 418 (Minn. 1992) "comment[ing] on historical problems resulting from close proximity between judicial elections and partisan politics," and then "infer[s] that the prohibition on candidates announcing their general views on disputed issues was intended in part to prevent judicial campaigns from becoming routine political contests." P. App. 51a. But no concrete evidence is adduced demonstrating more than a conjectural, inferential relationship between the announce clause and a legitimate concern with the lack of judicial impartiality arising therefrom. *See id.*

Moreover, no evidence was introduced that, in previous eras without the announce clause, Minnesota suffered from a greater public perception of lack of judicial impartiality or that the strong majority of states that have less-restrictive provisions also suffer.[38] It strains credulity to believe that the ABA and the majority of state supreme courts would abandon the

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[38]In contrast, this Court in *Burson v. Freeman*, 504 U.S.191, 202-205 (1992), noted that the long-standing, ubiquitous character of polling place electioneering restrictions made production of evidence of their effectiveness unnecessary.

1972 announce clause if any of them believed that it was necessary to protect the public's perception of judicial impartiality.

Although the Eighth Circuit did not suggest that there was any specific evidence offered on the harm to impartiality prevented by the announce clause, it held that Petitioners' argument "misapprehends the [State's] evidentiary burden in this case," P. App. 48a, holding that the generalized evidence offered in support of the announce clause was sufficient to the State's burden under *Nixon*, 528 U.S. 377, and *Burson*, 504 U.S.191. P. App. 48a-52a.

Because the announce clause imposes a direct penalty on speech, however, the somewhat relaxed scrutiny on required evidence in *Nixon* and *Burson* has no place here. *Nixon* involved a challenge to campaign contribution limits, which have been held by this Court to be subject to a diminished standard of review. Unlike the exacting scrutiny required when speech is directly restrained, as here, contribution limits could survive if the government demonstrates that the contribution regulation is "closely drawn" to match a "sufficiently important interest." *Nixon*, 528 U.S. at 378 (quoting *Buckley*, 424 U.S. at 25). But this case does not involve contributions made by third-parties to judicial campaigns. It involves speech to be made by a candidate to further the candidate's own campaign.

In *Burson*, 541 U.S. 191 (1992), a plurality of this Court upheld a prohibition on solicitation of votes and display of campaign materials within 100 feet of polling places. The *Burson* Court held that the 100 foot electioneering ban was a "minor geographic limitation" that did not constitute a "significant impingement" on First Amendment rights. *Id.* at 210. The

Court noted, however, "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills v. Alabama*, 384 U.S. 214 . . . (1966)." *Id.* The announce clause sweeps so broadly that it clearly amounts to more than an insignificant restraint on content-based speech akin to the "minor geographical limitation" at issue in *Burson*. It is an absolute prohibition on candidate speech akin to the complete ban on distribution of campaign literature at issue in *Mills*.

Such an absolute prohibition on candidate speech requires clear, compelling and specific evidence that it serves an interest in protecting judicial impartiality. Because no such evidence has been offered in this case, there is insufficient proof that the announce clause serves any compelling interest, much less that it is necessary to protect such an interest, or is the least restrictive means to do so.

V. The Announce Clause Has Untoward Consequences.

A. The Announce Clause Undermines Public Support for Judicial Independence.

Since it is apparent that judges and judicial candidates have views on disputed legal or political matters, there is a danger that silence simply inspires the suspicion that they are concealing their views to mask the judges' partiality or bias. Faith in the impartiality of the judiciary is just as easily lost by implying deceit as by implying allegiance. Thus, "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance

respect." *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

Furthermore, the announce clause stifles positive efforts to promote public confidence in the judiciary. As the Chief Justice of the Wisconsin Supreme Court has observed, an elected judicial system "can increase the citizen's understanding of the judicial function and the need for judicial independence," but "voters' lack of information" is a serious impediment toward this end. Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973, 977 (2001) ("*The Ballot*"). Ultimately, "[t]he public's appreciation of and respect for judicial independence is . . . the best way to ensure that the judiciary will remain independent." *Id.*

B. The Announce Clause Hampers Efforts to Remove Judicial Candidates Who Are Partial.

Voters are concerned about preserving both accountability and judicial impartiality through elections. *See generally* Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections*, 82 Judicature 216 (1999) ("*Voter Knowledge*"). Thus, because the public values judicial impartiality, voters will "support judges whom they perceive as independent even if they do not agree with particular decisions." *The Ballot* at 986. Furthermore, "voters who would have judges exercise independent judgment also see elections as providing the means for this outcome to occur from public balloting." *Voter Knowledge* at 223. Thus, to the extent that the announce clause deprives voters of knowledge of the partiality of judge candidates, it hampers the ability of the people to identify and weed them out.

Impartial judicial decisionmaking requires a commitment to deciding cases on the law and facts before them and without

regard to, or even contrary to, majority public opinion. The two 1999 public surveys by the NCSC and ABA found strong public support for such impartial decisonmaking by judges. In the NRSC's survey, 83% of the American people disagreed with the statement: "I would prefer that a judge ignore the law to ensure that a defendant is convicted." *NCSC Survey* at 33. In the ABA survey, 57% of the respondents disagreed that "[c]ourt decisions should reflect the majority of public opinion." *ABA Survey* at 66. Thus, there is strong public support for judicial impartiality.

Furthermore, voters will use the ballot to defeat judge candidates who they view as partial. The most famous example is the 1986 California retention election of Chief Justice Rose Bird and her colleagues. The essence of the campaign against them was that they had consistently opposed the death penalty in their decisions because of their personal opposition to the death penalty and, thus, were not impartial. John T. Wold & John H. Culver, *The Defeat of the California Justices: the Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 Judicature 348 (1987). The voters "clearly felt that Bird *had* injected her personal views into her decisions regarding litigation and court administration." *Id.* at 355 (emphasis in original). Other judges viewed as partial have not faired much better. *See* Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. Cal. L. Rev. 535, 542 (1999) (examining the defeat of a candidate for the Texas Court of Appeals due to an unusually light sentence the judicial candidate gave to a man convicted of killing two gay men and accompanied with statements to the effect that "gay people's lives are not worthy of equal respect and protections").

Thus elections are viewed by the voters as a means of protecting judicial impartiality. The announce clause undermines this goal.

C. The Announce Clause Is an Ultimately Futile Effort to Get the Politics out of Politics.

The Eighth Circuit inferred that one of the reasons for the announce clause was "in part to prevent judicial campaigns from becoming routine political contests." P. App. 51a. Thus, state limits on "the content of what a judge may say in [a] campaign" have been characterized as "like trying to take the politics out of politics." *Legal Ethics* at 889.

However, this quest is futile because "[o]nce we gave up drawing our highest judges in a genetic lottery, by birth into the House of Lords, every system of judicial selection other than some form of competitive civil service examination had to be political." Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. Cal. L. Rev. 1995, 1998 (1988). This is fundamentally true because judges, whether appointed or elected, are selected through a political process. Whether the process is election or appointment, a judge is often viewed as beholden to those that got her there and for future advancement. *Snyder* at 257. This is not to say that these influences should not be minimized; they must be in order to preserve the independence and impartiality of the judiciary. But whether by election or appointment, politics plays some role in the selection of judges.

The more fundamental problem here is that the people of Minnesota have chosen *electoral politics* as their vehicle to select judges. Some disagree with this choice and support appointment, including many who criticize the announce

clause.[39] However, the selection of electoral politics for choosing judges necessitates an election – when "the First Amendment comes into play to protect speech that is at the core of the free speech rights." *Legal Ethics* at 889. It is this election that really gives rise to the candidate's need to speak and the voter's need to hear, *see Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J, dissenting); *Renne*, 911 F. 2d at 294-95 (Reinhardt, C. J., concurring), which is undermined by the announce clause.

D. The Announce Clause Undermines the Integrity of the Election of Judges by the People.

If the announce clause were effective in depriving the voting public of information about judicial candidate's general views on disputed legal and political issues, as described above, the voting public would be deprived of information necessary to make an informed choice. Such a result can only be justified by accepting the patronizing implication that the general electorate must be protected from itself by remaining in ignorance. This is, however, completely at odds with our theory of democracy and the nature of the elective process itself. As this Court observed in *Brown*, 456 U.S. at 60:

> [The First] Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with

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[39] For voters, it seems to be "six of one, half a dozen of another." A substantial majority perceives judges as "negatively influenced by political considerations," which "does not differ greatly" between states with partisan elections and those with appointment or merit selection. *NCSC Survey* at 43.

a compelling justification for limiting speech.

Indeed, as Thomas Jefferson explained:

> I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion.

Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) in John Bartlett, *Familiar Quotations* 344-45 (Justin Kaplan ed., 16th ed. 1992).

The announce clause effectively takes from the people of Minnesota the discretion they have conferred upon themselves. As a result, it has subverted the method which the people chose to select judges, by a free and open election.

CONCLUSION

Petitioners pray this Court to reverse the Eighth Circuit and hold the announce clause of Minnesota Judicial Canon 5A(3)(d)(i) unconstitutional under the First and Fourteenth Amendments.

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